United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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74-2542

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O/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2542

CHRIS-CRAFT INDUSTRIES, INC.,
Plaintiff-Appellant-Cross-Appellee,

—*against*—

PIPER AIRCRAFT CORPORATION, HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORPORATION, NICOLAS M. SALGO, DAVID W. WALLACE AND THE FIRST BOSTON CORPORATION,
Defendants-Appellees-Cross-Appellants.

Appeal from a Judgment of the United States District Court for the Southern District of New York

BRIEF OF DEFENDANTS-APPELLEES—CROSS-APPELLANTS

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Appeal from a Judgment of the United States District Court for the Southern District of New York

BRIEF OF DEFENDANTS-APPELLEES—CROSS-APPELLANTS

Preliminary Statement

Defendants-Appellees and Cross-Appellants, Bangor Punta Corporation ("BPC"), David W. Wallace, Nicolas M. Salgo, The First Boston Corporation ("First Boston"), Howard Piper, Thomas F. Piper and William T. Piper, Jr. ("Piper defendants"), jointly submit this brief in opposition to the appeal of Chris-Craft Industries, Inc. ("CCI") and in support of their cross-appeal from the final judgment entered by Hon. Milton Pollack, D. J., on November 25, 1974.

Questions Presented

1. Is the finding of fact that CCI incurred money damages of $1,673,988 in accordance with the mandated measure of damages clearly erroneous?

2. Do the injunctive provisions of the final judgment as framed by the District Court implement the mandate of this Court?

3. Was the award of prejudgment interest erroneous?

4. Should the decision of this Court dated March 16, 1973 be reconsidered and the original judgment of the trial court reinstated?

PART I

DEFENDANTS' BRIEF IN OPPOSITION

Proceedings Below

CCI in its brief (pp. 1-30) presents a totally distorted picture of what transpired before the District Court on remand and unjustifiably accuses the District Court of flouting the express mandate of this Court. Nothing could be further from the truth. CCI, by misrepresenting the facts and ignoring the mandate of this Court, attempts to obfuscate its failure to prove that it suffered any money damages caused by the violations found. CCI's blatant attempt to rewrite the record should be disregarded.

Defendants will not attempt to catalogue all of CCI's misstatements.* This Court's decision of March 16, 1973 sets forth the relevant facts concerning the liability of Defendants to CCI. (480 F.2d 341) The opinions of the District Court rendered after hearing the parties on the

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* No useful purpose will be served by detailing each and every misstatement of the record below contained in CCI's brief. For a few examples of CCI's technique, see the Addendum to this brief.

issues of damages and injunctive relief (2327-89A; 380 F. Supp. 507)* and the comparatively short transcript of the trial below present a complete picture of the facts relevant to the issues before this Court.

The complete answer to CCI's vicious attack on the decision of Judge Pollack lies in a few short sentences in his opinion:

> "The Court has weighed all the relevant factors indicated in the testimony and reports of the experts and the exhibits introduced at the hearing. The Court has had the opportunity to see and hear the witnesses and to appraise their evidence, its potency and believability in the light of all the facts and circumstances of the trial record and the record of the hearing on the relief to be considered. . . .
>
> "The evidence persuasively established that actual majority control was worth between 5% and 10% above fair market value of Piper stock in the circumstances of this case with a block of 37% or 42% of the total capital opposing the majority. Certainly then, the *opportunity* (speculative at best) of gaining a majority from a 42% plurality is generously valued at 5% above fair value of the stock, in such circumstances.
>
> "Accordingly, the total damages to be awarded to CC are $1,673,988. ($2.40 times the total number of shares held by CC on September 5, 1969, 697,495)." (2373-75A)

CCI attempts to deny there is an issue of credibility in the determination of the damage question because it is not a simple matter of truth or falsity. But precisely because it is a more subtle and difficult question of confidence in the judgment of experts on complex issues of valuation,

* References followed by the letter "A" are to the joint appendix on appeal; references preceded by "EV" are to the exhibit volumes.

it is all the more important that this Court defer to the views of the trial cou *Korth* v. *Zion's Savings Bank & Trust Co.*, 148 F.2d 170 (10th Cir. 1945). See also *Richland* v. *Crandall*, 262 F. Supp. 538, 547-50 (S.D.N.Y. 1967).

POINT I

CCI's Brief Ignores This Court's Mandate

A. Prior History of This Action

This is the third appeal in this action. The characteristic common to each of these appeals is CCI's tactic of submitting the case on one theory to the trial court and then arguing a different theory on appeal to this Court. CCI's brief on this appeal again follows this tactic and also totally ignores the previous determination in this case by this Court.

After the affirmance of the denial of a preliminary injunction by this Court on the first appeal (426 F.2d 569 (2d Cir. 1970)), this case was tried on the merits before Judge Pollack. Prior to the trial, CCI withdrew its demand for injunctive relief, and upon this representation, the case was tried as a suit for money damages only. (1105A). On the second appeal, CCI again changed its course and reinstituted its request for injunctive relief. *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corp.*, 480 F.2d 341, 379 (2d Cir. 1973), *cert. denied*, 414 U.S. 910 (1973). Over objection, this Court permitted CCI to revive its demand for injunctive relief and remanded the case for a determination of the quantum of damages suffered by CCI and the entry of appropriate injunctive relief. In its remand, this Court undertook to provide "guidance to the district court as to the form of relief to be granted" based upon the contentions made to it by CCI. 480 F.2d at 379.

On remand, CCI again altered its course. At the trial of damages before the Court below, CCI attempted to reopen the battle for control of Piper Aircraft Corporation

("Piper") and sought huge money damages based upon its claim that had it not been for the acts of Defendants "victory (was) within its grasp". CCI therefore claimed that it should be awarded damages for loss of control, not loss of the "opportunity to compete for control" as it previously argued to this Court. Further, despite its representation to this Court that it was "no longer interested" in control of Piper, CCI attempted to use this Court's mandate concerning injunctive relief to reopen the "control battle".

In its brief in this third appeal, CCI does not make any attempt to disguise its purposes and sets forth as though it were accepted fact (pp. 7-11) that, but for the Defendants' acts, it would have obtained control of Piper. Further, CCI urges that the mandated injunctive relief should not merely deny BPC the "fruits" of the exercise of its majority interest, but should also allow CCI to confiscate this interest by using its minority interest to dilute BPC's equity in Piper by any means except merging Piper into "CC(I) or any affiliate." (p. 62)

The District Court was not misled by the tactics of CCI. After hearing all of the expert testimony and the arguments of the parties, the District Court, with this Court's mandate firmly in mind, entered judgment for CCI for money damages of $1,673,988 plus interest of $599,010.89 together with injunctive relief that effectively denies BPC the "fruits" of its majority interest in Piper. (2392-95A)

CCI characterizes this award of over $2 million as a "minimal sum". CCI has never accepted this Court's judgment that the injury it sustained was the loss of the "opportunity to compete for control of Piper" and argues it is entitled to compensation for every loss connected with its Piper investment, including the general decline in the stock market and the $14 million it claims it has spent since 1969 in carrying charges of its Piper investment, neither of which could possibly have been caused by Defendants' con-

duct. CCI's unwarranted attack on the District Court is nothing more than an attack on this Court's conclusion that CCI did not prove that it could have obtained control of Piper and an attempt to impose an insurer's liability on Defendants for all CCI's alleged costs of its Piper investment. Although the final judgment "may not be everything" that CCI "hoped for" (2400A), based upon the record it made before the Court below and the economic realities of the business world, it is more than CCI is entitled to receive. The District Court gave CCI the benefit of every doubt.*

B. The Mandate

In its previous decision, this Court in an exhaustive opinion stated both the legal and factual grounds upon which it based its reversal. Further, in an unusual step, this Court set forth the specific "measure of damages" it had determined was applicable to CCI's injury and the objectives to be accomplished by the equitable relief to be entered on remand.**

In directing the entry of a judgment for money damages against Defendants, this Court held:

> (1) "We agree with the District Court's findings that CCI failed to show with reasonable certainty that it would have obtained a controlling position in Piper had it not been for the violations of the securities laws by BPC and First Boston" (480 F.2d at 373);

---

* The enormity of CCI's claimed damages can be better appreciated if one considers its entire claim: $31.5 million for "loss of value" of its Piper investment; "carrying charges" of its Piper investment of over $14 million; and attorneys' fees, which CCI's counsel represented were in excess of $2.1 million, for a total of $47.6 million plus legal interest of over 30% from September 5, 1969, or more than $61 million. In addition, CCI will still retain its 42% interest in Piper and, under its sought after modifications to the decree entered herein, would also have both legal and *de facto* control of Piper.

** Under POINT IV, infra, the mandate as it relates to the grant of injunctive relief is addressed in detail.

(2) "We cannot say that CCI would have obtained a majority of Piper stock had BPC not violated the law . . ." (480 F.2d at 378-79);

(3) "What the securities law violations caused was a denial to CCI of a fair opportunity to compete for control of Piper. The specific injury sustained was a reduction in the value of CCI's Piper holdings upon BPC's unfairly obtaining control" (480 F.2d at 375);

and, therefore,

(4) "The measure of damages should be the reduction in the appraisal value of CCI's Piper holdings attributable to BPC's taking a majority position and reducing CCI to a minority position, and thus being able to compel a merger at any time." (480 F.2d at 380)

The mandate of this Court to the District Court controlling the determination of money damages could not have been made more clear. The burden was on CCI to prove its alleged damages in accordance with the defined "measure of damages". (*Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 389 (1970)).

C. CCI's Brief on Appeal

CCI's brief (pp. 5-30) charges the District Court with contemptuously refusing to accept both the mandate of this Court and the evidence offered by CCI in support of its multi-million dollar damage claim. On the contrary, an examination of the trial record reveals that CCI purposefully ignored the clear definition by this Court of the issues remaining open for determination by the trial court and offered expert testimony that was totally irrelevant and inherently incredible. CCI is the one responsible for its own situation, not the District Court.

In its brief, CCI argues that its injury was the loss of control of Piper, not merely the loss of the "opportunity to compete for control of Piper" in the circumstances of the heated battle underway in the summer of 1969. CCI states as fact that it "had victory within its grasp" (p. 9) and that the "statistical probabilities, but for defendant's illegal acquisition, were over 99% in CCI's favor". (p. 40) CCI then suggests (pp. 57-61) that it should receive as damages the difference between the highest price given by any expert that had testified on its behalf, $72 per Piper share* (or, in the alternative, at least its average "cost" per Piper share, $64) and the price that one of its experts testified could have been realized in a distress sale of all of CCI's Piper shares in January, 1970, $27 per share, for a total claim for damages of $45 per Piper share, or approximately $31.5 million.

Nowhere in CCI's brief or in the evidence it presented is there any clear statement of what it considers to have been the "reduction" in the "appraisal value" of its Piper shares after BPC obtained a majority interest. Instead it argues (p. 48) that the mandated "measure of damages" is inapplicable because of the "uncertainties" and "expressions of doubt" voiced by the District Court after evaluating CCI's evidence and finding it unconvincing. Therefore, CCI argues that the so-called "Bigelow rule" should apply because of the "uncertainty" which surrounds the application of the mandated formula. The only uncertainty in the instant case was caused by CCI's refusal to offer credible evidence relevant to the determination of damages in accordance with the mandate, *although its experts admitted they could have done so.* The Court below was required to look to the Defendants' experts in determining CCI's quantum of damages.

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* The abandoned Dr. Bellemore ascribed $73 per Piper share for a majority interest. See p. 22, infra.

POINT II

The Expert Testimony Presented to the Court Below by CCI Was Irrelevant and Incredible

The expert testimony offered by CCI to prove its alleged damages was an affront to common sense. Not only did CCI fail to offer any evidence upon which the Court below could determine the quantum of damages in accordance with the mandated formulation, but the "expert" evidence offered was patently incredible, inherently contradictory and unworthy of any consideration. *Despite the explicit mandate of this Court, CCI offered no evidence establishing any reduction in the appraisal value of its Piper shares when BPC succeeded in purchasing a majority of the Piper shares on or about September 5, 1969.* Instead CCI offered various inconsistent theories to inflate the value of a hypothetical "plurality" of Piper shares at the relevant time, and then compounded discount upon discount, deflating the value of its Piper block after BPC secured a majority. This deflated value was not even in form an appraisal valuation, but, as CCI's experts acknowledged, the purported price which would have been realized by CCI upon an assumed *sale* of its Piper shares at some indeterminate date after September 5 under conditions of a distress sale.

The Court below properly held that CCI failed to prove it suffered any damages in accordance with the mandated formula and arrived at its conclusion that CCI was entitled to $1,673,988 in damages mainly upon the testimony of Defendants' experts.* A brief analysis of CCI's expert evidence will conclusively establish that the trial court's decision to reject most of the testimony offered by CCI was correct.

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* In Point III, infra, the testimony of Defendants' experts and the findings of fact of the trial court are discussed in detail.

CCI offered the testimony of five experts in support of its claim for damages: Dr. Douglas L. Bellemore* ("Bellemore"), Sigmund Wahrsager ("Wahrsager"), Dr. Roger F. Murray ("Murray"), Robert Rosenkranz ("Rosenkranz"), and Steven J. Ross ("Ross"); and the Defendants offered the opinions of three experts: Clifford L. Fitzgerald ("Fitzgerald"), Donald R. Gant ("Gant"), and Aubrey B. Lank, Esq. ("Lank").

Despite CCI's contentions in its brief, *all* of the experts agreed that: (a) whether the valuation of Piper shares is made as of August 7, 1969 or September 5, 1969, and whether you assume CCI had a hypothetical "plurality" of Piper shares of 41% to 31% or 42% to 37%, the value of CCI's Piper shares would be the same (2410-11A; 2507-09A; 2625A; 2747A; 2822-23A); (b) the methodologies employed by Defendants' expert Fitzgerald to arrive at an estimated fair market value absent the contest for control and an "investment" or "intrinsic" value of Piper shares were the correct methods (2418A; EV824-30; 2511A; 2532-33A; EV881; 2621-22A; EV916-18; 2751-54A; EV1220-23; 2821A; EV1242-43; 3299-3302A); (c) the normal attributes of control had little or no identifiable value to CCI (2496A; 2499A; 2508A; EV882; 2713-16A; EV918-19; 2903-05A; 2923-25A; EV1245-46A; 3324-32A); and (d) in arriving at an appraisal value of Piper shares, the value per share of a round lot (100 shares) is the correct criterion. (2412A; EV822; 2508A; EV877-78; 219A; EV918-19; 2750-51A; EV1219)**

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* Contrary to the assertion in CCI's brief (p. 19, n. **), CCI did not desert Bellemore until after the trial below. (2346A, n. 10; 3123A, 3129A)

** CCI's complaint in its brief (p. 27) that the Court below erred in accepting this criterion advanced by all the experts is without merit. The question of the effect of so-called "blockage" caused by the size of CCI's Piper holding and its alleged "illiquidity" were considered separately by all the experts.

An analysis of the assumptions and theories advanced by CCI's experts on their direct testimony in their efforts to weave a basis for the huge amount of damages claimed by CCI in the light of the admissions wrung out of them on cross-examination reveals the superficiality of their efforts.

Sigmund Wahrsager. Wahrsager, a member of the investment firm of Bear, Stearns & Co. and experienced in the investment banking field, approached his testimony by assuming that a statistical certainty applied to contests for control. (2462-67A; 2476A) He testified that, although the estimated market value of Piper shares on September 5 absent the contest for control was $52 per share, and their "intrinsic" or "investment" value was $50 (2412A; 2427-29A; EV823; EV830), because of the "commanding lead" (2432A) existing in CCI's hypothetical "plurality" of Piper shares on September 5, CCI's Piper shares had a value of at least $72 per share, or 40% more than his estimated market or intrinsic value.*

When Wahrsager was pressed on cross-examination for the justification of his opinion that a responsible businessman would have considered paying CCI approximately $49 million to acquire its Piper investment which in his judgment was worth only $35 million, in order to get into the "dog fight" with BPC, he revealed the sole basis for his 40% premium.

He testified:

> "Q. So they would have paid a $14,000,000 premium over this estimated market price to get into this dog fight?

---

* Wahrsager could not offer a single instance in any of the many contests for control that have taken place in recent years where a 40% premium had ever been paid by a third party to buy out the interest of one or both of the contestants in a control battle. (2462-65A, EV867-72) Even in friendly take-overs, there were few 40% premiums paid. (EV863-66)

A. Not to do that. To get into the dog fight with a very clear visibility that they were going to prevail in the dog fight.

Q. This 99 percentile you are talking about?

A. Yes." (2467A)

When questioned by the trial court, he again clearly stated:

"Again, the threshold issue is how persuasive is the argument as to the statistical odds of their prevailing." (2467A)

The "statistical odds" Wahrsager referred to was his assumption that, in a contested fight for control between two corporate adversaries, even though one had ample funds to match and improve upon any offer made by the other, the statistical theory of "random selection" would apply. (2476A) As in "flipping a coin", under random selection, if one party is ahead of another in a contest, the party ahead statistically has to reach a majority before the other. As Wahrsager admitted, such a conclusion is a "truism", or a "99% sure thing". (2476A)

However, when asked the obvious question:

"Q. In other words, you are saying that if Bangor Punta had offered $5 a share more than your prospective purchaser here at $72 your random selection of 50-50 chance would still be applicable?" (2481A)

he gave the only truthful answer he could:

"A. No. What I am saying is that unless Bangor Punta was prepared to get into a bidding contest—obviously, if they pay more money, they have a better chance, but I suspect that that would be something they would consider long and hard because they have got to then view Mr. 'X' as topping their bid." (2481A)

When he was reminded that in fact what had occurred was a bidding contest and that BPC had outbid CCI by $15 per share to acquire its Piper shares, he again ignored the realities and sought refuge in his random selection theory. (2481-83A) Defendants' expert Gant stated the obvious when he testified that even at the conclusion of the rival exchange offers on August 4 when BPC was ahead 45% to 41%, CCI could have succeeded in acquiring a majority control if it had been willing and able to pay the price. (2876-77A)

Judge Pollack held that the applicability of the random selection theory "is sufficiently doubtful as a matter of business experience and common sense in a situation where there is a bidder with greater resources at his command" (2364A, n. 18) and gave no credence to this testimony. (2366-67A)

Wahrsager made no attempt to arrive at an appraisal value of CCI's Piper shares after BPC succeeded in acquiring a majority on September 5, although he admitted he could have done so. (2484A) Instead, Wahrsager assumed a number of unsupported facts and attempted to predict what he thought the Piper shares could have been sold for five to nine months after September 5. (2442-43A) Wahrsager agreed, however, with Defendants' experts that, in a public offering on September 5, CCI's Piper block would have been readily marketable at a price reasonably close to the fair market or intrinsic value of the investment. (2484A)

Swinging from the unbounded optimism created by his "random selection" theory, Wahrsager sank to the depths of despair; and, by assuming a public sale at distress conditions, not in September, 1969, but at best in late January, 1970, he opined that the most CCI could have realized for its Piper shares was $27 per share (2453A), a decline of

60% from his $72 per share figure.* However, he admitted that, if a sale had taken place in November, 1969, CCI's Piper block could have been sold on a public offering for $36.75 per share (2654A), only 15% less than what Gant testified would have been received two months earlier in a more favorable economic climate.

Even more revealing is Wahrsager's testimony on cross-examination that, although he had "some difficulty" in reaching a conclusion as to what CCI would have realized from a sale of its Piper block in September, 1969, he could have done so. (2484A)

Wahrsager testified as follows:

> "Q. Are there methods available by which, if you had assumed the hypothesis that it was sold publicly on September 5, 1969, could have arrived at what you would consider to have been the estimated market price?
>
> A. If you could have as your hypothesis that it could be sold and that was unchallenged, there are methods for determining the market price and, in fact, we have done that.
>
> Q. Even if you don't consider a sale but, for example, you use your Method E (EV822-23, 830), which you used, you could have arrived at what the appraised investment value of Chris-Craft's 41% block was on September 5?
>
> A. Appraised value on September 5 would not have been markedly different from the appraised value on— In other words, if we are talking about that kind of thing that doesn't change from month to month.

* Wahrsager testified that he would have expected to sell CCI's Piper shares at $30 per share in January, 1970, but he discounted this price another 10% because of the "serious issue" involving a reserve for possible expenses. (2452-53A) On cross-examination, he admitted that the "serious issue" did not in fact exist. (2485-87A)

Q. It would have been around $50?

A. Yes." (2484A, EV823, 830)

In Wahrsager's opinion, CCI's Piper shares on September 5 would have had an estimated fair market value in a public offering of "around $50", $4 to $6 per share more than Gant testified ($44 to $46), and $2 per share more than the determination of the Court below of the fair market value of Piper shares at the time ($48).

Professor Roger F. Murray. Dr. Murray's approach to the determination of the quantum of damages allegedly suffered by CCI was "obscure" and differed completely from Wahrsager's. He disagreed with Wahrsager that any prudent person would have paid a premium over the estimated market value or intrinsic value for CCI's Piper shares when it had a hypothetical plurality (2514-16A; 2569-74A) and, although not an investment banker but a college professor, he stated that CCI's Piper shares could not have been sold in a public offering (2582A). Murray arrived at his appointed goal by an "oblique" route, using a "conglomerate value" factor of his own creation.

Murray testified that until BPC purchased 50.1% of the Piper shares, the estimated market value and intrinsic value of all Piper shares (including CCI's), incorporating his "conglomerate value" factor, were $57 per share and $68 per share respectively. (2508-09A) His "free standing" market and intrinsic values of Piper shares, i.e., without his "conglomerate value" factor, were $36 per share and $40.80 per share respectively.*

His explanation for the 40% difference between his estimated market values of $36 and $57, and intrinsic values of $40.80 and $68 (EV878), was due to what he character-

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* Murray accepted the economic analysis and conclusions of Defendants' expert Fitzgerald, who testified that the intrinsic value of Piper shares was $42.10 per share, except for a minor variation resulting in a reduction of $1.30 per Piper share. (EV883)

ized as the "conglomerate value" factor,* that is, "the expectation evident at least from 1967, that Piper would become a part of some larger enterprise." (2512-15A) He contended that prior to the control fight, prudent investors had anticipated that Piper was a takeover candidate for a conglomerate, and were therefore willing to pay approximately 40% more for its common stock than its true value in the expectation of receiving a windfall. (EV877-82; 2512-14A; 2534-35A)

Cross-examination developed that Murray's novel theory, like Wahrsager's, was based upon a premise that had no support in the record or in reality. Murray testified on direct (2511-14A) that beginning in 1967, Piper "met all the specifications of an attractive candidate" for the conglomerates which were then in their heyday. His specifications for a conglomerate target were: (1) substantial cash resources; (2) understated assets; (3) substantial borrowing capacity; and (4) complementary product lines. (2563-66A) He added that because Piper was the only one of the three major companies in the general aviation industry readily available for acquisition, it was peculiarly a conglomerate target. (2511-14A; 2559-63A; 2567-68A)

On cross-examination, Murray unhesitatingly admitted that none of his first four "specifications" was present in Piper. (2563-66A) In explanation, he testified that his last element, amenability to takeover, was the most significant because dominant personalities in Beech Aircraft and Cessna were not favorably disposed to a conglomerate takeover. It was in this sense, Dr. Murray testified, "that I was using the term 'conglomerate value' ". (2513-14A)

On cross-examination, Murray was asked:

"Q. Are you familiar with the transcript of the case, of this case, the Chris-Craft case, as to the efforts made

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* The higher conglomerate factor values were obtained by using price-earnings multiples of 19.9 for estimated market value and 22.3 for estimated intrinsic value, as against 12.5 and 13.2 respectively for "free standing" value. (EV881-83)

by the Piper family to prevent their company from being taken over?

A. No, sir.

Q. Did you ever make any study of that, ask any questions?

A. No, sir.

Q. You just assumed that the shares were owned by various groups who would be sold out at one point of time as distinguished from Mr. and Mrs. Beech; that is your assumption?

A. That's my assumption and it was the assumption held by other investors, which is so crucially important in the determination of market value.

It is not really what I think, it is what investors perceive that will determine what they are willing to pay for the shares. And this was their clear perception." (2560A)

An examination of the trial record in this case would have quickly disabused Murray of his assumption that the Piper family was amenable to a take-over by a conglomerate or that anyone would have had any such perception. The cause of the high multiple experienced by Piper between 1967 and 1969 was in fact fully explained by Fitzgerald and Wahrsager to be a normal condition experienced by a cyclical company in a period of depressed earnings. (2551-56A; EV824-26; 3299-3301A; EV1122-23) Absent his self-conceived "conglomerate value" factor, Murray attributed the lowest values to Piper shares of any witness.

The only support for the drastic reductions in his valuation of CCI's Piper shares after BPC acquired a majority (market value, $57 to $20—65%, and intrinsic value, $68 to $27.44—60%), was the disappearance of his discredited

"conglomerate value" factor, and the "illiquidity" of CCI's Piper investment caused by the threat of a merger. (2519-22A; 2532-36A)

The justification given by Murray for the disappearance of the "conglomerate value" factor in CCI's Piper shares after BPC obtained 50.1% was equally incredible. He testified that when BPC purchased for cash the shares necessary to give it 50.1% of the Piper shares, a prudent investor would conclude that BPC would not merge with Piper, and, consequently, the "conglomerate value" factor present in Piper stock would suddenly disappear. (2586A; 2591-93A) Therefore, it follows under his theory, *as he admitted on cross-examination,* that if the outstanding injunction against any merger between BPC and Piper were dissolved and BPC announced an intent to merge with Piper, the "conglomerate value" of CCI's Piper shares would immediately be restored. (2591-92A)

Further, Murray's rationalization for the disappearance of the "conglomerate value" factor and the resulting 40% reduction in the market value of Piper shares ($57 to $36), i.e., no possibility of a merger involving Piper, directly contradicts his conclusion that CCI's Piper shares could not be the subject of a public offering in September, 1969 because of the threat of a possible merger.* (2520-22A) In short, Murray cumulated reductions in the value of CCI's Piper shares both on the theory that a merger was likely and the theory that it was not.

Judge Pollack's conclusion that Murray's expert opinion was "oblique" and "obscure" is an understatement. (2347A; 2368A)

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* Murray's premise that a public sale was not an alternative, contradicts the views of the three investment bankers who testified (Wahrsager, Fitzgerald and Gant).

Robert Rosenkranz. Rosenkranz's testimony was given no credence by the trial court, and rightly so. His professional background and his self-interest in CCI's welfare did not qualify him to express any opinion on the issues before the Court below. A newly-made partner (two months before the trial) in his firm with limited experience as a "junior" in corporate finance, he had introduced CCI as a client to his firm, and his firm had performed paid services for CCI in addition to his "expert" testimony at the trial. (2651-54A)

However, despite his lack of experience, Rosenkranz had no hesitancy in disagreeing with Wahrsager and the other experienced investment bankers that a public distribution of CCI's Piper shares was possible. (2644-46A)

Further, he, like Murray and Wahrsager, opined that, after BPC acquired 50.1% of Piper, CCI's Piper shares promptly declined 60% in value. (EV920-26) He, like Murray, but unlike Wahrsager and Ross, refused to assign a premium to his valuation of CCI's plurality of Piper shares on September 5 ($58). Although on the witness stand he suggested a premium might have been paid, he finally disavowed the "random selection" theory of Wahrsager (2664-69A) and testified: "It was not part of our assignment to try to assign a premium based upon the hypothesis that Chris-Craft had a plurality of the Piper shares." (2627A)

Rosenkranz opined that at the relevant time CCI's "plurality" of Piper shares would have "readily" sold in the market place for $58 per share, which price he opined was also the fair market value irrespective of the fight for control. His assumed price-earnings ratio, based upon the average of the last quarter of 1968, ignored the decline in the general market and in Piper in the summer of 1969, as was considered by the other experts. (2698A).

Although on the witness stand he extemporaneously adopted Murray's "conglomerate value" theory, which he

did not think, when pressed, was "terribly material" (2657-58A), his own "expert" justification for the 60% differential in value after September 5 proved to be without even a theoretical rationalization and completely arbitrary.

His first thesis was based on the conclusion that CCI's Piper shares could have been sold privately, which view was contrary to all the other experts. On this premise, he proceeded to review a number of private purchases of small blocks of securities by mutual funds that invested in unregistered securities and found "discounts ranging from 4% to 50%, averaging 25% on a weighted basis and 30% unweighted." From this clearly inapplicable research, Rosenkranz concluded that, in the instant case, a 60% discount ($58 to $23.20) in CCI's Piper investment was appropriate after BPC obtained a majority. (2683-87A)

His second thesis was his "appraisal value" method. (2636-40A) However, on cross-examination, it was developed that he had absolutely no experience in appraisal proceedings, his "appraisal" was clearly deficient by even rudimentary standards (2687-94A), and was not intended to be an appraisal at all, but ". . . more precisely, what [he] was doing was giving an investment banking judgment as to what somebody would have paid as an investment to step into CCI's shares facing the prospect of an appraisal proceeding." (2694A) Rosenkranz's testimony on direct that he made an appraisal of Piper shares in accordance with the mandate was a purposeful deception. (2636-41A) His so-called "average appraisal price" of $25-$28 per share, discounted to $20, has no economic or factual justification.

His last rationalization was even more unusual. Rosenkranz testified that, in his opinion, in September 1969, an individual purchaser of *all* of the outstanding Piper shares would have paid only $21.34 per Piper share, or a total of approximately $34 million (2643-44A), while he estimated

the public market value of all Piper shares without the contest for control as $58 per share, or a total of approximately $99 million (2620-21A). In other words, the fact that Piper was publicly owned increased the inherent value of its securities three times.

The District Court was correct in giving no weight to Rosenkranz's so-called "expert" testimony.

Steven Ross. **Ross,** an unscheduled expert witness and long-time client of CCI's counsel (3061A), was produced on rebuttal, and was qualified by CCI as a "consummate deal maker". (3018-19A) This title was garnered from his recent history of accomplishing a series of "20 or more" acquisitions for his company. (3014-15A; 3040-42A) He prepared no formal written report on his expert testimony except for some pencil notes on a legal pad.* (3017A; 3020-21A; 3024-25A) His testimony was apparently intended to bolster Wahrsager's "random selection" theory and was equally ridiculous. (3020-27A; 3072-73A)

Ross readily admitted on cross-examination that he had made no study of the financial condition of Piper (3056A), BPC (3058-59A) or CCI (3059-60A) at the relevant time. Although he testified on direct that a premium attached to CCI's Piper shares over their fair market value while it enjoyed an assumed "plurality" (3017A; 3020A; 3057A), on cross-examination he was unable to express an opinion on the amount of any such alleged premium or even the fair market value of Piper shares. (3068-71A) Like Wahrsager in his defense of the "random selection" theory, Ross shut his eyes to the effect of a bidding contest between two corporate suitors on the element of chance. (3072-73A; 3019-29A) Unlike Wahrsager, he did not believe a public offering of CCI's Piper shares was an alternative. (3030-32A)

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* After testifying, he reduced his pencil notes to typewritten form. (EV1109-10)

When examined as to the value of CCI's Piper shares after September 5, he expressed the opinion that the value of CCI's investment was situated somewhere between "no value", "very little value" and "much depreciated value", but was unable to quantify the value. (3053-55A; 3065-68A)

The Court below quite properly rejected Ross.

Dr. Douglas Bellemore. Bellemore, CCI's abandoned expert, opined that BPC's interest in Piper was valued at $73 per share after it acquired a majority, which he calculated was the average price paid by BPC and CCI for their Piper shares,* while at the same time CCI's minority interest was worth only $7.50 per share, by far the lowest valuation of any expert. (3386-88A)

When asked on cross-examination how he rationalized such a sharp disparity, he testified that the basis of his opinion was the assumption that BPC would have been able to acquire CCI's Piper shares for only $7.50 per share in statutory appraisal proceedings after a merger, thereby reducing its average cost per Piper share to approximately $45 per share. In other words, a majority interest in Piper was valued at $73 per share because it gave the majority owner the right to acquire the balance of all the Piper shares for his appraisal value of $7.50 per share, and thereby reduce the over-all average cost of the investment to $45 per share, six times his appraised value. (3280A)

No wonder CCI jettisoned Bellemore!

CCI called no other witnesses with respect to the valuation question. Instead, it called two unscheduled rebuttal

* Although Bellemore had furnished a written report prior to trial supporting his opinions, no mention was made in such report of this conclusion. (3388A) On cross-examination, he first stated that he did have a written report supporting this conclusion but it was unavailable; then, when pressed to produce it, he pulled out of his pocket a library card containing his pencilled calculations on the witness stand. (3283-84A; EV1119)

witnesses, Potts and Gordon, to testify to CCI's claimed ability in 1969 to continue financing its campaign for control of Piper. The point of the testimony was to show—in defiance of this Court's mandate—that CCI had control of Piper in 1969 or enjoyed a virtually certain chance of obtaining control. The testimony presented on this point was not only irrelevant to the issue before the District Court, but also inconsistent and incredible.

Robert H. Potts. Potts, an officer of a Philadelphia bank, testified on the ability of CCI to borrow money in August-September, 1969 and the relative "bankability" of a majority and minority interest in Piper.* (3103-05A)

Potts, a long-time friend and banker for CCI and its President Siegel (3106A), had personally recommended approval by his bank of a $15 million loan to CCI used to purchase Piper shares that still remains unpaid. (3107-08A) Despite CCI's financial position in August-September, 1969, he testified he would have freely recommended to any bank (but of course not his own) advancing another $10 million to CCI, even though, in his expert opinion, such a loan would constitute a default on CCI's senior indebtedness. (3111-15A)

C. Leonard Gordon. Gordon, the former general counsel of CCI who testified at the first trial, again took the stand in support of his former employer, but instead of repeating the same story he had told before (which the trier of fact had found unworthy of belief at the time), he came up with a new twist. Gordon testified extensively at the first trial in support of the proposition that in early February, 1969 CCI could have obtained financing to complete its take-over attempt. (1199-1202A) At the second trial, he provided a new embellishment and testified that financing was totally un-

* The District Court sustained the objection to the testimony of this unscheduled purported expert witness, but allowed CCI to make its record. (3104A)

necessary because between April and August, 1969, CCI had between $12 million and $16 million in cash reserves available to purchase Piper shares. (3085-87A)

On cross-examination, Gordon, unlike banker Potts, refused to admit that CCI was restricted under its senior indebtedness from purchasing for cash any further Piper shares after February, 1969. Finally, when confronted with his own letter to CCI's senior lenders conceding a default (EV1449-50), he admitted that CCI was not permitted to purchase sufficient Piper shares to give it control without the consent of the holders of the senior indebtedness. (3090A) Of course, Gordon, like Potts, asserted such consent would have been readily forthcoming because of CCI's hypothetical "commanding lead" in the control contest. (3088-90A) Gordon's and Potts' suggestions of the availability of funds, even if relevant, are hardly persuasive of what a lender would have done in September, 1969 in the face of BPC's determined and well-financed campaign. (3110-14A)

From all the foregoing, the conclusion is inescapable that not only did CCI fail to offer any credible evidence in support of its claim for damages in accordance with the mandated formula, but it offered no credible evidence to support a claim for damages on any theory. *CCI deliberately refused to follow the mandate of this Court.* That economic methodologies are available to quantify the reduction in appraisal value of Piper securities before and after BPC obtained a majority is undeniable. Although such a determination necessarily depends upon assuming hypotheticals, it certainly is within the competence of an experienced investment banker, as CCI's expert Wahrsager admitted on cross-examination. (2484A)

CCI, for its own obvious purposes, refused to assist the Court below in its difficult task of carrying out this Court's mandate and is entitled to no further consideration.

POINT III

The District Court's Factual Determination of the Quantum of CCI's Damages Is Fully Supported by the Record and Effectively Implements This Court's Mandate

On its remand, by reference to the "reduction in the appraisal value" of CCI's Piper shares, this Court ordered the District Court to determine what, if any, value CCI's Piper investment lost when CCI lost the "opportunity to compete for control of Piper" by reason of BPC's achievement of a majority ownership interest in September, 1969 as follows:

> "The measure of damages should be the reduction in the appraisal value of CCI's Piper holdings attributable to BPC's taking a majority position and reducing CCI to a minority position, and thus being able to compel a merger at any time." (480 F.2d at 380)

In accordance with this specific mandate, the Defendants offered the oral testimony and written reports of three recognized experts who testified directly to the issue of the reduction in appraisal value of Piper shares before and after BPC's acquisition of a majority position on September 5. (2745-57A; EV1211, 1232; 2822-23A; EV1236, 1247; 3299-3302A; 3325-26A; 3330A; EV1120-23)

After hearing the testimony and judging the credibility of the witnesses, the District Court rendered a comprehensive sixty-page opinion analyzing all the evidence submitted to it on valuation of Piper shares and the facts relevant to the value of control and the opportunity to compete for control. The Court below concluded that: (a) the appraised fair market value of Piper shares absent the contest for control was $48 per share; (b) a control premium of between 5% and 10% of such fair market value would attach to the majority block of Piper shares when a large vocal minority block was present; (c) a premium of 5% of the fair market value of Piper shares should be added

to CCI's "plurality" interest in Piper in recognition of CCI's "opportunity to compete for control" of Piper when a large block of Piper shares was in active opposition, thereby making the appraisal value of CCI's plurality position in Piper prior to BPC's acquiring a majority interest $50.40 per Piper share ($48 plus 5%, or $2.40=$50.40); (d) after BPC acquired its majority interest in Piper, the appraisal value of CCI's Piper shares was reduced to their fair market value of $48 per share; and therefore (e) the reduction in the appraisal value of CCI's Piper shares after BPC acquired a majority was $2.40 per share. The trial court then multiplied the number of Piper shares owned by CCI at the relevant time by the $2.40 and awarded CCI over $2.1 million in damages including prejudgment interest.

The District Court's factual determination of the value of CCI's assumed lost opportunity to compete for control of Piper is amply supported by the record, is certainly not "clearly erroneous", is wholly consistent with the mandate of this Court and constitutes a generous award in view of the substantial evidence adduced at trial indicating that any award of damages to CCI would be at best speculative.*

A. Defendants' Evidence

A brief review of the testimony of Defendants' experts fully supports the conclusion of the trier of fact that "Gant together with Fitzgerald emerged as the experts on whom the most reliance could be placed in reaching the damages to be ascertained here; Gant together with Fitzgerald gave the most acceptable and convincing guidance on the issues." (2372-73A)

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* At trial two of CCI's witnesses, Murray and Rosenkranz, testified that the risks involved in the control battle over Piper were so great that CCI's investment—even assuming it constituted a sizeable plurality position—could not be valued above the ordinary fair market value of the stock, *i.e.*, that no premium reflecting the "opportunity to gain control" was warranted. Understandably, CCI now chooses to ignore this part of the case it presented at trial. (pp. 15, 19, supra)

Clifford L. Fitzgerald. Fitzgerald testified extensively at the first trial (3299-3324A) and the Court below found that his testimony was "careful", "well documented" and "persuasive in the main" on the issue of the fair value of Piper shares at the relevant time. (2349A) At the second trial, all of CCI's experts* accepted the economic analysis techniques employed by Fitzgerald, and Murray even accepted all of his assumptions of fact and conclusions with a minor exception. (2575-76A)

In summary, Fitzgerald concluded that: (a) the intrinsic value** of Piper shares on September 5 was $42.10 (3299A); (b) under the circumstances prevailing in Piper at the relevant time, CCI's Piper shares would have been valued approximately the same whether it was a majority or large minority holder (3224-32A); and (c) in his opinion, "a reasonable buyer would be willing today to pay as much per share for Chris-Craft's 42 percent of Piper as for Bangor Punta's 51 percent." (3377A)

As Fitzgerald pointed out, although investors do pay premiums to obtain control (3324-25A), no premium would be paid in the instant case because it involves a "situation that would be litigious or hostile . . . (and) would be very difficult to exercise control and to make reasonable business gambles, as would be the case when you were not being constantly second-guessed." (3329A) Fitzgerald addressed himself specifically to the issue of the value of control of Piper to CCI, and concluded that control would not have any measurable value to CCI. His opinion recognizes the realities of the Piper situation. (3325-32A)

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* Even the rejected Bellemore accepted Fitzgerald's methodology and disagreed only with his assumptions.

** Intrinsic value" is the true economic value of a security, whereas "market price" is the "point of disagreement" between a buyer and a seller which could be more or less than "intrinsic value." (3344A)

Aubrey B. Lank. Lank, a member of the Delaware Bar, with extensive experience in statutory appraisal proceedings both as an advocate and as an appraiser, testified that in his opinion, in a statutory appraisal proceeding, CCI would receive the same award for its Piper shares whether Bangor Punta owned a majority of the Piper shares or both Bangor Punta and CCI held large minority interests.*

Lank, using the accepted techniques employed in statutory appraisal proceedings, concluded that on September 5, after Bangor Punta obtained a majority, CCI's Piper shares had an appraisal value of $49.32.

In reaching this opinion, Lank had concluded that the estimated market value of Piper shares was $52.50 per share, their intrinsic value was $52.48 per share and their net asset value was $31.31 per share. He then concluded, employing the procedures applicable in appraisal cases, that market value should be weighted 45%, investment value 40% and asset value 15%, and arrived at his appraisal value of $49.32.

Lank deflated CCI's contention that the theoretical right to compel a merger at any time reduced the appraisal value of its Piper shares. CCI has asserted, without any foundation in the realities of business life or the record, that a merger would be proposed by BPC at the bottom of a business cycle and would necessarily adversely effect an appraisal award. When examined by CCI's counsel, Lank gave the obvious total answer:

> "Q. Do you agree that the appraisal process will tend to produce conservative results where the values are speculative and the majority power to pick the time in which to trigger the appraisal may encourage them to move when full values may be temporarily obscured?
>
> A. No. I don't believe so.

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* As CCI pointed out in its brief (p. 15), Lank did not express an opinion on what CCI's Piper investment could be sold for because it was irrelevant. (2788-89A)

Q. Have you read the Vorenberg article?

A. I have, many times.

Q. Do you disagree with that observation?

A. Yes, because I have had the same thing tried on me as an appraiser, and I think to counteract that very suggestion is that you eliminate a value that you think is artificial or manufactured by the control corporation or you reconstruct a market value which more nearly reflects the actual market. Our cases have done that time and time again.

Q. I am not talking about the market value. What about earnings?

A. Very easily, Mr. Liman. What I think the Court could do, what I would do in a case like that, if I was faced with maybe one or two bad years after a series of good years I would increase the area—instead of five years maybe I would make it eight or nine or ten, because it is not fair to a stockholder." (2771-72A)

To argue otherwise is to contend that a state court will allow a controlling shareholder to use the legal process to take advantage of a minority holder.

Donald R. Gant. Gant and Fitzgerald were the two experts upon whom the trial court, after listening to all of the expert witnesses and observing their demeanor on the stand, properly placed the most reliance. Gant was a long-time member of a prominent investment banking firm and had by far the most extensive experience in the valuation of securities. His testimony was based upon good, practical, business common sense touched with extensive experience, and not contrived misapplication of statistical theories or imagined obstacles to a public sale. (EV1235-66; 2813-2930A)

After making an analysis similar to the other experts, Gant testified that on September 5 the estimated market value of CCI's Piper shares, if offered to the public, would

be in the range of $44 to $46 per share.* (2822-23A) Gant, like Wahrsager, but unlike CCI's other experts, had no hesitancy in voicing his opinion that CCI's Piper shares could be sold publicly. (2824-25A)

When questioned regarding premiums paid by companies seeking control of another, Gant defined the nature of control and how control premiums are valued. (2917-20A; 2924-25A) Gant testified that in situations where a company is seeking control of another, premiums are generally paid and are calculated on the estimated fair market value of the shares being purchased *before* such price is influenced by the take-over. (2839-40A) In the case of Piper, it was his opinion that control was worth "very little" (2881A) and there was a "low" or "no reasonable expectation" that a buyer would purchase CCI's plurality position because of the presence of BPC, a viable contender. Therefore, he concluded, there was no "premium value" to CCI's Piper position. (2901-03A) In fact, it was his view that any individual purchaser of CCI's plurality position would want a discount from his estimated market value of $44 to $46. (2904-05A)

When asked by CCI's counsel to value a majority interest when a large minority holder is present specifically keeping in mind the ability to compel a merger, Gant testified:

> "A. Again if the block of 50 per cent plus is not opposed by another block of 40 per cent, I would say it

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* Necessarily, he assumed there would be no contest for control underway in this situation. He also took into consideration the depressant effect such a large block of stock would have on the market price when offered to the public. (EV1241-43, 1247; 2921A) Furthermore, the cases cited by CCI in its brief (pp. 38-9) relate to companies not publicly held. This Court has consistently held that "blockage" discounts may not be applied to the shares of publicly held corporations. *Bull* v. *Smith,* 119 F.2d 490, 492 (2d Cir. 1941); *Richardson* v. *C.I.R.,* 151 F.2d 102, 103-4 (2d Cir. 1945), *cert. denied,* 326 U.S. 796 (1946). Piper had a public credibility and was formerly actively traded on the New York Stock Exchange. As Wahrsager and Gant concluded, CCI could readily sell its Piper shares to the public.

would command a premium, but where you have a right to compel a merger but you have the uncertainty of the cash appraisal award, you don't know how much it will be and whether you will be able to finance it, then that right is not worth very much." (2923A)

When asked by the Court below what the value of a 41% interest in Piper would be with a large minority present and the opportunity to achieve a majority was still available, he expressed authoritatively the value of such interest. (2924-25A) Gant stated that, if a friendly take-over is assumed and the balance of the shares are widely distributed, a premium of 20% to 30% over his estimated fair market value of $44 to $46 could be expected for the controlling block. However, in the instant situation where a person is buying one contestant's position with a large vocal minority, only if he is *assured* of obtaining 51% would any premium be paid, and then only possibly "5% to 10%" over estimated fair market value. (2925A)

Gant was hardly a witness who could be "pressed" by the Court below to engage in venturing "impromptu opinions", as claimed by CCI. (CCI brief, p. 18) An examination of his whole testimony and Fitzgerald's establish their qualifications to express authoritatively the opinions upon which the trial court relied in reaching its conclusions.

B. The District Court's Findings of Fact

In its sixty-page opinion, the District Court painstakingly analyzed every theory of damage logically flowing from the mandate of this Court, and the proof submitted in support of these theories by the parties. Contrary to the assertion in CCI's brief (p. 25), the Court below did not opt "for the so-called 'strict literal meaning' " of the mandate as had been urged by the Defendants, but instead gave CCI the benefit of every doubt in accordance with the "broad remedial intent" of this Court's mandate. (2332-42A) An examination of the analysis made by the trial court conclusively establishes that the damages awarded

CCI were in accordance with this Court's mandate and are more than generous.

1. *Fair Market Value of Piper Stock.* The District Court correctly observed that before a determination can be made of any reduction in appraisal value of CCI's assumed plurality of Piper shares, a value must be established for all Piper shares that excludes the effects of the control battle. The Court below determined that the estimated fair market value of Piper shares absent the control contest as testified to by the experts, which is necessarily an appraisal valuation, was the appropriate starting point.* (2342-44A) All the experts agreed with the Court below that the prices paid by CCI and BPC f r their Piper shares in the heat of battle had no relationship to fair market value. (2411-12A; 2509-11A; 2621-22A; 2780-85A; 2903-4A; 2907-8A; 3297A)

The Court below observed:

> "The amounts paid by the contestants in the midst of the battle are by no means the sole or even a fair indication of the premium relevant herein. The conduct of contestants in such battles is often marked by 'irrationality' (2904-08A); no expert testified that the Piper investment was worth anything approaching the $80 per share paid by the parties. The amounts paid were clearly widely and artificially inflated due to the emotional, as well as actual, struggle of the parties. Such amounts, therefore, must be discarded for purposes of determining *fair* market value." (2344A)

With the exception of the abandoned Bellemore, the expert testimony on the fair market value of Piper shares absent the control battle was not so far apart, with CCI's

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* If the District Court had used the estimated "intrinsic" or "investment" value of Piper shares offered by the experts, the starting point for the assessment of damages would have been $46.35 per Piper share (Warhsager, $50.00; Dr. Murray, $40.80; Lank, $52.48; Fitzgerald, $42.10).

experts testifying on the high and low ends of the price range and Defendants' experts in the middle. Six expert witnesses testified concerning the fair market value of Piper stock on September 5 absent the control battle. All the experts used the same accepted methods of valuing securities in determining the fair market value of Piper shares.*

Wahrsager concluded that the fair market value of Piper at the relevant date was about $52 per share** (EV822-23). Dr. Murray's "free standing" market value was $36 per share (EV882-83). Rosenkranz performed three separate calculations, averaged the results, and concluded that Piper's fair market value was $58 per share. (EV915-18)

Defendants' expert Lank determined that the fair market value would be approximately $52.50 per share*** (EV1219). Gant calculated a fair market value for CCI's Piper shares in terms of the price at which they could have been marketed in a registered secondary offering on September 5, and concluded that CCI's entire Piper block could have been sold at a market price of $44-$46 per share. (EV1241-43)

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* Some witnesses also employed other techniques. Wahrsager, for example, calculated the fair market value of Piper on September 5, 1969 on the basis of the historical relationship between its stock prices and those of Cessna, one of Piper's principal competitors. (EV828-29) The result was to confirm Wahrsager's other calculations as well as those of most of the other expert witnesses.

** Wahrsager studied financial data for Piper, Cessna and the S&P Industrials for the period 1960-68, but, as a matter of judgment, weighed the 1966-68 data more heavily in his calculations. Giving all data for the period equal weight, Wahrsager determined a somewhat lower fair market value for Piper of $45 per share for early September, 1969, which was identical to Gant's valuation. (EV823)

*** Lank's method differed slightly from that employed by the other experts in that he valued Piper in accordance with its average earnings for the previous five years rather than its earnings for the year immediately preceding or its anticipated earnings. (EV1220-23; 2751-52A) The method chosen was in accordance with the applicable law relating to dissenting stockholder proceedings.

Finally, Fitzgerald testified that the intrinsic value of Piper shares on September 5 was $42.10 per share (EV1120-23. CCI charges in its brief (p. 27) that the District Court mistakenly employed Fitzgerald's "intrinsic value" computation in reaching its conclusion instead of using his "market value" estimation of $55 per share. CCI is in error. Fitzgerald testified that the estimated market price of Piper shares on May 8, 1969 was $55 per share. (EV1121) Fitzgerald prepared only one valuation of Piper for September 5, 1969, and it was $42.10 per share. Although Fitzgerald's calculation was an "intrinsic" or "investment" valuation (employing anticipated earnings and a normalized multiplier) rather than a "market price" valuation (employing actual earnings for the previous year and the contemporary price/earnings multiple), this does not make its use improper. The District Court sought to determine a *fair* market value for Piper at September 5, and the use of an investment valuation, which is the theoretically correct market value of a security, as one factor in the averaging of all the experts is wholly consistent with that aim. *See Perlman* v. *Feldman,* 154 F. Supp. 336 (D. Conn. 1957). CCI's complaint is a semantic quibble of no real substance.

After considering all of the foregoing evidence and observing that "choosing one expert's figure over another on this issue would be to reject one accepted technique while accepting the other" (2352A), the trial court averaged the six figures, rounded the result upwards and found as a fact that the fair market value of Piper stock on the applicable date was $48 per share.*

2. *Value of the Legal Ability to Compel a Merger at Any Time.* CCI's contention that BPC's legal ability to compel a merger at "any time", which CCI automatically equates with the bottom of a "business cycle", reduced the value of its Piper investment is not only contrary to the

* Even excluding the extremes of Rosenkranz and Murray and the generally accepted Fitzgerald valuation, the result is approximately the same. (2352A)

financial realities of the business world, but is also without foundation in law. Although all of CCI's experts testified that the threat of an impending merger affected the value of its Piper investment, none of them testified to any accepted method of quantifying this alleged reduction in value except by arbitrary discounts ranging from 40% to 60% from their inflated market values.

Gant put this contention of CCI in proper context when he testified in response to CCI's counsel:

> "Q. Assume that one of the attributes of control that the buyer gets is the right to compel a merger, and assume that he gets the right to have a majority of the board. Have blocks of stock been sold at premiums in those circumstances?
>
> A. Again, if the block of 50 per cent plus is not opposed by another block of 40 per cent, I would say it would command a premium, but where you have a right to compel a merger but you have the uncertainty of the cash appraisal award, you don't know how much it will be and whether you will be able to finance it, then that right is not worth very much." (2923A)

Gant's testimony is entirely consistent with the business factors which directly control the exercise of the power to merge. As the Court below observed:

> "It is unclear as a matter of practical finance whether BP would in fact choose such a time for merger. At the bottom of a business cycle and in a period of contraction, BP (and thus Piper) would clearly have limited resources or at least limited economic incentives to fund an appraisal award; CC's huge minority block, by any standard, would sport a heavy price tag to be borne by BP in such a proceeding. Moreover, as markets rise, the cash cost of satisfying an appraisal demand might well increase greatly without a corre-

sponding increase in available cash to fund the payout, thus chilling any prospect of merger in such circumstances.'' (2341A, n. 7)

The factual support for the conclusion that any diminution in the value in a minority interest due to the existence in the majority of the power to compel a merger is ''too speculative to quantify'', is buttressed by the legal principles involved in determining values in a statutory merger.

In the final analysis, the power to compel a merger gives the holder thereof the right and obligation to pay the holders of the minority interest the ''fair value'' of their investment in cash. As Lank testified, in any appraisal proceeding after a merger, the majority holder will not be permitted to take advantage of the minority by picking the bottom of a business cycle to merge. (2771-7[illegible]A) No state court would allow a majority shareholder to use the judicial process to take advantage of the minority. CCI's contention that the appraisal value of its Piper investment was reduced by the ''threat of merger'' is pure speculation without any basis in reality.

3. *Value of Control.* The District Court properly concluded that in order to ascertain the difference in value caused by a loss of an ''opportunity'' for control, control itself must first be valued. (2352A) The District Court asked each witness offered by CCI if he had any opinion on the value of control of Piper to CCI. With the exception of Rosenkranz, each witness unhesitatingly testified that he had no opinion on this question. (2444-47A; 2537-40A) Rosenkranz testified that control afforded the holder thereof the ability to use the ''cash flow'' of Piper (2713-18A), and, with a mathematical calculation which totally ignored the actual cost to CCI of its investment and assumed that CCI would have been able to acquire 100% of Piper at a fixed cost, ascribed a multi-million dollar value to control of

Piper. (2726-32A) Rosenkranz's assumptions of fact were obviously incorrect. Further, Piper had a negative cash flow since 1967. The District Court gave no credence to Rosenkranz's theoretical exercise.

Despite CCI's failure of proof, the Court below through its examination of Defendants' experts pursued its inquiry of the value of the opportunities that control confers.

The Court below stated:

> "Defendant's expert Fitzgerald, testifying at the initial trial, accurately surveyed the elements in valuing control, noting that the holder could derive the benefits of equity financial reporting, the ability to direct the business and its policies, the ability to merge or sell assets, declare dividends, sell stock, obtain counter-seasonal or counter-cyclical effects and the prospects of an enhancement in a price/earnings ratio of the acquirer. (3325-32A)." (2356A)

Fitzgerald, after completing a meticulous analysis of the elements of control of Piper, concluded that no premium would attach to a block of control stock in the "litigious" and "hostile" circumstances prevailing (3329A).

The Court below then considered those specific factors which made control of Piper of dubious value to CCI. Principal among these was the fact that even if CCI had gained control of Piper, it would have been without the continued services of the existing Piper management and facing a hostile minority shareholder possessing at least 37% of the Piper equity under a charter and by-laws providing for cumulative voting. As the District Court correctly observed:

> "The Piper family and management had long since displayed its adamant opposition to any takeover by CC. The value of having management on BP's side cannot be minimized, and that is a value that BP alone possessed. Moreover, the 'winner' of the contest, whoever

> it might be, knew full well that it would be faced with a large and highly vocal minority opposition—hardly the ideal corporate situation to maximize the potentialities of control. . . . This is particularly so where, as here, the rival interests have displayed a willingness to litigate every issue and there is the capacity to force a costly appraisal proceeding to forestall or hamper the exercise of control." (2365A).

With all the foregoing evidence and considerations in mind, the District Court found:

> "There has been no showing that the Chris-Craft regime could have in any way altered or improved the Piper picture. If anything, the major value of the control position to CC appeared to be solely as a fulcrum for later sale. To be sure, ultimate control of Piper could well have resulted in various forms of improvement of CC's balance sheet, but such amorphous enhancements are incapable of reasonable valuation. Furthermore, to the extent that CC sought control of Piper for the purpose of being able to integrate the Piper earnings with the CC earnings, that result was accomplished even absent control by an accounting methods change in 1970 which permitted such accounting. (3328A) Thus, in the long run, CC lost nothing in this regard when it lost the fight for a majority of the stock." (2360-61A)
>
> * * *
>
> "The Court has searched vainly in the record for specific identification of the advantages of control to CC reducible to money value." (2367A)

Unable to find any evidence of definite and quantifiable advantages which CCI might have realized from the exercise of control of Piper, the District Court persisted in its inquiry to determine what, if any, value CCI might have derived from the sale of its assumed plurality position in

Piper in 1969 (2361-66A). The difficulties attendant upon any such possible disposition are obvious.

As Gant testified:

> "I am describing an atmosphere in which the holder of the majority has a very vocal minority stockholder who is contesting his position and where the board is divided and where litigation proceeds, [and] that is not an atmosphere that most people want to get into and for which they will pay a premium." (2925A)

The Court below considered the testimony of Wahrsager that control of Piper was valued at 40% over the fair market value of Piper's shares and rejected it. (2366-67A) Such estimates as CCI's other experts, Murray and Rosenkranz, were prepared to make of the control value of Piper were found to be "obscure" and "vacillat[ing]" (2368A). CCI's expert "consummate deal maker", Ross, voiced no opinion on "value, fair or otherwise". (2348A, n. 11)

Finally the Court below assessed the testimony of Gant. Gant authoritatively testified that while peaceful enjoyment of control of Piper might bring a premium of 20%-30% over fair market value for the controlling block of securities, a premium "at best" of no more than 5%-10% over fair market value could be expected in the turbulent situation surrounding Piper *and only if the purchaser was assured of gaining control.*

Gant testified as follows:

> "THE COURT: What would be the elements of that kind of quantification, at least in theory?
>
> THE WITNESS: Well, if you started with what would someone pay to control Piper, assuming that these two had never happened on the scene, and Mr. Piper decided it was time to step down and he didn't want to run the company any more and went looking for a

merger partner, I would expect that somebody would pay a premium of, say, 20 to 30 per cent of the market value of Piper at the time.

The Court: 'Market value' meaning the fair value?

The Witness: The price at which it was selling, assume it was not distorted by rumors or anything else. That would be to have a nice peaceful enjoyment where you get 100 per cent and whatever management continuity you wish, and no fights, no legal problems. That would be my best guess to what somebody would pay.

What they would pay to have a 51 per cent position where you have an opponent holding 42 per cent, cumulative voting, where the board is divided, lawsuits, I really don't know how to go about appraising it, but I don't think it would be very much.

The Court: What does 'very much' mean? I can't tell the way you express it. You mean it is de minimis?

The Witness: It is certainly less than 20 per cent, so it might be 5 per cent, 10 per cent.

The Court: 5 or 10 per cent of what?

The Witness: Of the fair market value, again." (2925A)

Based on the foregoing, the District Court concluded that the value of control of Piper where a large vocal minority was present ranged between 5% to 10% of the fair market value of Piper shares, $48. (2374A)

4. *The Value of CCI's Lost "Opportunity to Compete for Control."* Except for Wahrsager, who ascribed a 40% premium to CCI's Piper investment based upon his "random selection" theory, none of CCI's experts would ascribe a specific premium to, or otherwise attempt to quantify, CCI's assumed lost "opportunity".

Gant succinctly set forth the obvious:

> "Consider the situation that would have confronted a successor to Chris-Craft in September, 1969. While he would have inherited a five percentage point lead in the battle for control of Piper, he would have been facing a formidable adversary who had the support of management, cash resources of about $12 million plus additional financing capability, and a demonstrated commitment to the battle, reinforced by a contractual agreement with the Piper family to use its best efforts to achieve a majority position. Some measure of the extent of that commitment could be seen in Bangor Punta's aggressive purchases of over 100,000 shares of Piper in the open market during the preceding month at prices averaging approximately $80 per share. . . .
>
> "Any prospective entrant then would have had to recognize that in addition to the price paid to acquire Chris-Craft's holdings he had to be prepared to risk an unknown but substantial amount of cash (since he could not count on having the time to prepare a registration statement for an exchange offer of securities) in an attempt to buy control. If his efforts proved unsuccessful, he would risk the loss of any premium he paid Chris-Craft over the realistic market value of its block together with the premium on any shares acquired in the market." (EV1244-45)

The risks which attached to CCI's Piper investment, even considered as a "plurality" block, are obvious and enormous. The District Court properly assessed CCI's chances of actually gaining control of Piper as "speculative at best" (2374A).

In view of the Court's finding that actual control of Piper was worth only 5%-10% above fair market value

under the circumstances prevailing, its award to CCI of $2.40 per Piper share in damages (5% of fair market value) for its assumed loss of the "opportunity to compete for control of Piper" was most generous. There is ample support in the record for the District Court's finding of fact that the reduction in appraisal value of CCI's Piper investment after BPC obtained its majority interest was at most $1,673,988.

POINT IV

The Injunction Fully Implements the Mandate of This Court.

In its reversal of the dismissal of CCI's action, this Court stated that the District Court "deserve[d] guidance from this Court on the form of relief to be granted" and ordered that "after appropriate opportunity has been afforded to the parties to be heard on the issue of relief", in addition to Defendants' paying money damages, BPC "should be denied the fruits" incident to the 231,002 Piper shares held to have been illegally obtained (the "enjoined shares") by appropriate injunctive provisions in the final judgment. The Court below, conscious of its duty to carry out the mandate of this Court consistent with the facts as developed during the trial and the applicable principles of corporate law, fashioned a decree that effectively neutralizes for another five years all the incidents of ownership of the enjoined shares that could impair CCI's equity in Piper.

An examination of the District Court's decree reveals that CCI's sole complaint is that the battle for control of Piper has not been reopened.

A. The Mandate of This Court

This Court accepting CCI's representation that it "no longer desires to take control of a company that has been

substantially changed," awarded it damages and expressly ruled that:

> "Divestiture of the ill-gotten [Piper] shares would not be appropriate under the circumstances of this case because it would be difficult to administer and would unnecessarily reopen the control battle." (480 F. 2d at 379)

In lieu of a divestiture, this Court directed that BPC should be prohibited "from voting for a period of at least 5 years" the enjoined shares in order to deny it the "fruits of obtaining Piper shares illegally." Recognizing that the fashioning of equitable relief is historically within the province of the trial court, this Court did not "foreclose the district court from fashioning such additional appropriate relief as it may find necessary to implement" its decision.

The purport of the mandate was clear:

(a) The battle between CCI and BPC for control of Piper was not to be reopened;

(b) BPC's majority financial interest in the net equity of Piper was not to be affected because a "[d]ivestiture would not be appropriate under the circumstances of this case";

(c) CCI "understandably no longer desires to take control" of Piper and, therefore, a court-ordered transfer of control was not required; and

(d) BPC should be denied the legal advantages incident to a majority interest in Piper by prohibiting it from voting the enjoined shares for at least five more years.* (480 F. 2d at 379-80)

This Court obviously was concerned that CCI would be merged out of Piper without its consent at a time not of

* BPC has been effectively enjoined since September, 1969 from exercising its majority interest in Piper. (EV1445-48)

its choosing and mandated a voting restriction that would give CCI a reasonable opportunity to select the time when it wished to liquidate its Piper investment.

The injunction framed by the Court below carries out this mandate.

B. The Injunction

The decree unqualifiedly enjoins BPC from voting, directly or indirectly, the enjoined shares for a period of five years from its entry on November 25, 1974.

In addition, the injunction contains additional provisions which the Court below, after hearing the parties and considering the applicable corporate law, properly considered: (i) essential in order to reverse the actions taken by BPC at Piper since September, 1969; (ii) necessary to restore the parties to and maintain them in, the same relative positions they were in September, 1969 to the extent possible; and (iii) required to provide the corporate mechanics to implement the mandate. (2392-95A)

These provisions are:

(a) The enjoined shares are to remain "authorized and outstanding for all purposes under the laws of Pennsylvania and under [the] decree";

(b) The enjoined shares are not to be counted for determining a quorum at stockholders' meetings;

(c) All changes made in Piper's By-Laws and the size of its Board of Directors since September 4, 1969 were to be rescinded, and such By-Laws, size of the Board and Piper's corporate charter are to remain as they existed on September 4 except as otherwise agreed by CCI and BPC or ordered by the Court below;

(d) No increase or decrease in Piper's voting securities, and no merger, dissolution or liquidation involving

Piper can take place unless ordered by the District Court; and

(e) BPC and W. T. Piper, Jr. were to cause the implementation of "(c)" above and convene a meeting of Piper's stockholders within ninety days.

BPC and W. T. Piper, Jr. complied with the injunction.* A meeting of Piper stockholders is scheduled for February 26, 1975 to elect a new Board and the By-Laws of Piper have been reconstituted as ordered.

CCI challenges each of the above provisons of the decree.

C. The Purpose and Necessity for the Challenged Provisions

The provision of the decree referred to in "(a)" above eliminates any question that the injunction against BPC exercising the voting privileges incident to the enjoined shares was intended to affect their legal standing under Pennsylvania corporate law, by declaring that the enjoined shares are to remain as "authorized and outstanding" shares for all purposes under Pennsylvania law and the decree.

CCI contends that if the enjoined shares are not considered legally "authorized and outstanding," then it would own 50.1% of the "authorized and outstanding" Piper shares under Pennsylvania law and could effect the "major corporate actions" referred to by its counsel and in its brief (see D. *infra*) thereby reducing BPC's majority financial interest in the equity of Piper to a permanent

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* CCI sought a stay of the injunction pending appeal which was denied by the District Court. (2400-01A) No stay was sought from this Court.

minority interest. Although BPC contends that a decree of a federal court cannot alter the corporate law of Pennsylvania, this provision eliminates any future controversy in a state court.

The provision in "(b)" above is required in order to implement the voting injunction. If BPC did not cause its Piper shares to be represented at a stockholders' meeting, no meeting could be legally convened. Therefore, by not counting the enjoined shares for the limited purpose of determining a quorum, the decree eliminated another possible controversy.

The provision referred to in "(c)" above effectively rescinds all of the by-law changes made since September, 1969 by BPC using its majority vote, and, from a legal standpoint, places the parties in the same relative positions they occupied prior to BPC's actions. The purpose of this provision was to achieve the "proper balance" with the award of money damages, and to deprive BPC of the voting strength it exercised since September, 1969. (2380-82A) This provision effectively places the parties in the *status quo ante*, and keeps them there during the term of the injunction.

The provision described in "(d)" above is self-explanatory. The Court below has closed the door on the "control battle". This provision and that referred to in "(c)" above, effectively frustrate CCI's attempt to use the mandate of this Court to dilute BPC's majority interest in the net equity of Piper.

The provision in "(e)" above merely sets in motion the corporate mechanics to carry out the legal steps necessary to implement the decree.

As the District Court correctly observed, although "... none of the provisions operate to the disadvantage of plaintiff (CCI); they may not be everything that plaintiff

hoped for. . . .'' (2400A) The District Court has carefully structured an injunction which denies BPC the ''fruits'' of the enjoined shares, and prevents CCI from reopening the ''control battle''. (2396-2401A)

D. CCI's Charge That the District Court Defied This Court Is Without Merit

The thrust of CCI's attack on the injunction is that it does not award CCI ''effective control'' of Piper (CCI brief, p. 62) and, therefore, the ''District Court . . . defied the purpose of the mandate.'' (p. 51) CCI argues that the grant of the injunctive relief was intended to confer upon it a benefit, *i.e.*, control of Piper, which it never proved it could have acquired. However, CCI has been fully compensated by an award of damages for the loss of the ''opportunity to compete'' for control. As Defendants' contend in Point V herein, the injunctive relief granted can only be justified on the theory that it is prophylactic in nature and necessary to prevent violations of the securities law by others.

CCI does not disguise its intentions as it did when it last appeared before this Court, and falsely represented that it ''no longer desires to take control'' of Piper. Its counsel has openly set forth, under oath,* CCI's objectives:

> ''7. Finally, by declaring that the illegally-acquired shares should be treated as outstanding and by also enjoining CCI from voting its shares for stock issuance, merger, etc., the District Court precluded CCI and the public shareholders (which together hold 56% of the legally-acquired and votable Piper shares) from taking *any major corporate action without BP's consent* during the injunction period even in cases where

* Affidavit of Arthur Liman, Esq., sworn to November 26, 1974 and submitted to this Court in support of an application for an expedited appeal.

Piper's best interests clearly and conclusively call for such action...." [emphasis added]*

The euphemism "major corporate action" used by CCI's counsel is defined by CCI in its brief (p. 62) as any corporate action except merger of Piper "into CC or any affiliate." In other words, CCI seeks to obtain through the injunction what this Court confirmed it could not have obtained in the market place, legal "control" of Piper not merely "*de facto* control." As the District Court accurately pointed out, under its decree:

> "Chris-Craft is not being deprived of a single right which it had on September 4, 1969 according to its own voting strength—nor are voting rights being conferred on Chris-Craft which it did not have." (2398A)

The decree effectively deprives BPC of legal control of Piper, and CCI's suggestion that BPC has "*de facto* control" of Piper because Piper's Board of Directors may be evenly divided between CCI and BPC ignores what has taken place for the last five years and the realities of business life.

As the District Court found after reviewing the voluminous evidence relating to the operations of Piper since September, 1969 as reflected in the minutes of over 50 meetings of the Piper Board held between September 1969 and the trial (2979A; Def. Ex. BQ, BR, BS and BT):

> "The parties have operated as a *de facto* regency—albeit reluctantly—for some five years since the inception of this lawsuit. For better or worse, BP, while clearly exerting its majority influence in certain situa-

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* CCI's counsel did not point out to this Court that, excluding the enjoined shares, CCI will vote 50.1% of all Piper shares and, under his theory, the public shareholders' wishes are not a factor.

tions, has been stifled in fact from exercising that control in others." (2381A)

and

"There has been a de facto regency (at Piper) since 1969 in which the record fails to show any gains by Bangor Punta for itself or any of the true advantages of management control such as enhancement in the value of its ownership interest in Piper." (2401A)

It is a reality of business life that if a publicly-owned company has a 42% "partner" in an enterprise, the interests and views of such "partner" must be recognized and respected, or there will be constant litigation disrupting the management of the joint enterprise to the financial detriment of both parties. This is particularly true in the instant case where cumulative voting for directors is required, and will probably result in an evenly divided board of directors. A "regency" such as has existed at Piper since 1969 is a natural outgrowth of this situation and would exist because of the applicable corporate law and the economic pressures working on the managements of both companies.

Further, CCI's suggestion (CCI brief, p. 52) that the present operating management of Piper was selected by and will be dominated by BPC is false in fact. Every member of the present top operating management of Piper was hired with the express approval of CCI. Piper's present chief executive officer was jointly selected by CCI and BPC, and received with CCI's express approval, a seven-year employment contract expiring in 1980. (EV1419-22) The present senior executive in charge of sales and marketing was recommended by CCI and approved by BPC. (EV 1352-3) The present chief financial officer and senior executive in charge of engineering were unanimously approved by CCI's and BPC's designees on the Piper Board of Directors. (Def. Ex. BS, January 22, 1973 minutes, pp. 6-7)

The other present operating executives are all long-time Piper employees that CCI has never suggested should be terminated.* (EV1323-24; Def. Ex. BR, August 9, 1972 minutes, p. 3)

The suggestion that these experienced managers would compromise themselves by doing BPC's bidding is completely unfair and ignores the realities of the business world. As CCI accurately points out, during the period of the injunction the Piper Board of Directors will likely be divided equally between CCI and BPC, and no resolution can be adopted by the Board unless agreed to by both CCI and BPC. An officer's compensation is subject to the absolute control of CCI through its representatives on the Board. How long, in these days of rapid inflation, would an executive remain at Piper without a raise?

To suggest that either CCI or BPC would arbitrarily use an evenly divided board to frustrate the operations of Piper and impair its value ignores the obvious. It is in CCI's and BPC's financial interest to realize as much from their huge investments in Piper as possible.

CCI is raising a straw-man in so-called "*de facto* control" to conceal its true objective—to reopen the battle for legal control.

E. The Injunction Assures CCI That It Will Not Be Inopportunely Merged Out of Piper Without Its Consent

Besides the broader enforcement aspect of the injunction as a deterrent against violations of the federal securities laws by others, the injunction granted was obviously intended to assure that BPC would not take advantage of its majority position to merge CCI out at an inopportune time.

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* Although it is true that the Vice President and General Counsel and Secretary of BPC also serve in the same capacities without compensation at Piper, neither is involved in the operating management of Piper except as directors.

The injunction as framed by the District Court clearly protects CCI's equity in Piper by preventing BPC from forcing CCI out at a time not of its own choosing. As its own expert Wahrsager conceded, CCI's Piper investment is readily marketable in a public offering. Fully compensated by the award of damages for any loss which it has suffered caused by BPC acquiring a majority, Chris-Craft is also completely protected for another five-year period by being afforded ample opportunity to dispose of its Piper investment in an orderly manner and on the best available terms if it so wishes.

F. The District Court Is Vested With the Broadest Discretionary Power in Framing Injunctions

That a district court has full power "to mould each (equitable) decree to the necessities of the particular case" cannot be seriously disputed. *Hecht Co.* v. *Bowles,* 321 U.S. 321, 329-30 (1944). Mr. Chief Justice Burger recently affirmed this universally accepted principle in *Lemon* v. *Kurtzman,* 411 U.S. 192, 201 (1973), where he stated:

> "In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests. . . ."

In the instant case, the District Court was ordered not to reopen the "control battle" for Piper, but only to deprive BPC of all the legal advantages achievable by means of voting its enjoined Piper shares. It was not directed to divest BPC of its majority interest in Piper or to turn over control of Piper, *de facto* or otherwise to CCI. After a trial in which it carefully reviewed all the facts and law relevant to the situation existing at Piper, the District Court found it necessary to formulate provisions to maintain the *status quo ante,* and to protect BPC from having its equity in Piper diluted by CCI. The power of a district court to fashion an injunction so as to protect a defendant

from any unfairness or abuse to which a plaintiff might use the injunction has long been recognized. *Inland Steel Co.* v. *United States,* 306 U.S. 153, 156(1939):

> "A court of equity 'in the exercise of its discretion frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act. . . . It is a power inherent in the court, as a court of equity, and has been exercised from time immemorial.' "

See also *N.Y., Chicago & St. Louis R.R. Co.* v. *Brotherhood of Locomotive Firemen & Engineers,* 358 F.2d 464 (6th Cir. 1966).

A district court, in fashioning the injunctive relief it deems necessary and appropriate to the particular circumstances of a case, may be reversed only upon the clearest showing that it has abused its discretion. *Lemon* v. *Kurtzman, supra,* at p. 200; *SEC* v. *Manor Nursing Centers, Inc.,* 458 F.2d 1082, 1100 (2d Cir. 1972). CCI cannot make such a showing.*

POINT V

CCI Is Not Entitled to an Award of Its Attorneys' Fees or Alleged Carrying Charges.

A. Attorneys' Fees.

CCI claims that it is entitled to an additional judgment for its attorneys' fees over and above the judgment the

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* CCI's suggestion in its brief (p. 54) that the cases cited by the District Court in its opinion (2375-77A) are authorities for the proposition that appellate courts have considerable discretion to modify an injunction granted by a District Court is completely erroneous. The appellate decisions cited by the District Court affirm the broad discretion of a district court in fashioning injunctive relief. Only in one case, *Galella* v. *Onassis,* 487 F.2d 986 (2d Cir. 1973), did the Court of Appeals modify an injunction of a District Court because the District Court had clearly abused its discretion.

District Court has already decreed on the ground that such an additional judgment would serve an undefined "public interest." (CCI brief, p. 64)

There are only three bases for an award of attorneys' fees: (1) when a statute authorizes the award of such fees; (2) when a fund has been created through the efforts of the attorney; and (3) when the suit or defense is frivolous. Nothing in the Securities Exchange Act of 1934 ("1934 Act") authorizes the award of attorneys' fees. No fund was created, and as Judge Friendly pointed out in *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281 (2d Cir. 1973) an award of attorneys' fees is appropriate "only when 'the court believes the suit or defense to have been without merit'. This means a defense bordering on frivolity, not simply one that is unsuccessful. *Can-Am Petroleum Co.* v. *Beck,* 331 F.2d 371 (10th Cir. 1964); *Klein* v. *Shields & Co.,* 470 F.2d 1344 (2d Cir. 1972)" n. 33 at 1309. As the defense was clearly not frivolous, there is no basis for an assessment of an additional judgment for attorneys' fees against Defendants.

In *SEC* v. *Capital Counsellors, Inc.,* CCH Fed. Sec. L. Rep. ¶ 94,572 (S.D.N.Y. 1974), relied upon by CCI here, Judge Cooper denied the application of counsel for payment for attorneys' fees despite the fact that there was no other way that the attorneys could be paid. Hence, neither the authority it relies upon nor any other authority provides a basis for an award of attorneys' fees to CCI.

B. Alleged Carrying Charges

CCI seeks reimbursement as legal damages interest charges (over $14 million) it incurred on loans it allegedly obtained to finance a portion of its Piper investment. Such charges were clearly outside the mandated measure of damages. Moreover, these alleged damages were not established with any certainty to have been a consequence of Defendants' acts. (2382-83A)

As Judge Friendly stated in *Zeller* v. *Bogue Electric Manufacturing Corp.,* 476 F.2d 795 (2d Cir. 1973):

> "A plaintiff seeking consequential damages for fraud, at common law or under federal securities legislation, must establish the causal nexus with a good deal of certainty. Since consequential damages are an addition to or, in lieu of what would ordinarily constitute a fair recovery, there is no room here for applying the liberal principles of . . . *Bigelow* v. *RKO Radio Pictures, Inc.,* 327 U.S. 251, 264, 66 S.Ct. 574, 90 L.Ed. 652 (1946) . . . ." (at p. 803)

PART II

DEFENDANTS' CROSS APPEAL

POINT VI

Any Award of Money Damages to CCI Constitutes an Improper Penalty Under the Federal Securities Laws.

As this Court held:

> "We cannot say CCI would have obtained a majority of Piper stock had BPC not violated the law, but it is a fact that BPC obtained control through its unlawful acts." (480 F.2d at 378-79)

Indeed, the District Court found no evidence that CCI would have obtained any additional Piper shares but for the acts of the Defendants, a finding expressly affirmed on appeal.

Despite these conclusions of fact, this Court cited the "policy of vigorous enforcement of the securities laws through private litigation" as the justification for relaxation (or, as Defendants submit, total elimination) of traditional proof requirements (480 F.2d at 356-57), and directed the District Court both to grant injunctive relief against BPC preventing it from exercising its majority interest in

Piper to effect a merger and to assess monetary damages against all the Defendants equal to the reduction in appraisal value of CCI's Piper shares because of the threat of a merger.

An injunction has now been entered which eliminates any possibility that during the next five years CCI's interest will be merged out against its wishes, and, the economic facts of life as developed at the trial incontrovertibly establish that CCI controls its own investment in Piper, not BPC. Further the Court below properly concluded that any reduction in appraisal value of CCI's Piper shares caused by a threatened merger was speculative and could not be quantified. (2342A) The basis of the award to CCI of substantial money damages was because it was deprived of "opportunity to compete for control of Piper". However, CCI failed to offer any evidence that if it had obtained control of Piper (which this Court held that CCI failed to prove it could have done), control would have enhanced its Piper investment. An opportunity to accomplish a result which cannot be achieved and has no ascertainable value is worthless. That some hypothetical purchaser might have assumed CCI's position does not alter the practical effect of the damage judgment. The award of "damages" in this case is nothing more than a penalty or fine imposed without statutory or common law justification.

That the award is clearly a penalty is even more obvious in the case of the individual Piper defendants. In its brief (pp. 8, 20) CCI argues that but for the Piper shares acquired by BPC as a result of certain violations it would have "held a hypothetical 41%-31% lawful lead in the control contest". CCI computes this hypothetical lead by subtracting from the total shares of stock held by BPC and CCI in August and September, 1969 14½% of the Piper stock acquired by BPC through its cash purchases in May and through its exchange offer. Conceding that it did not have

the financing required to achieve control following its cash tender offer in January (2331A; 2358-59A), CCI claims that its "financial position had materially improved since January" so that in August it had the cash and the "borrowing capacity" to acquire the additional 10% of Piper's stock it required for control. (CCI brief, p. 9). But for these two blocks totalling 14½% of Piper shares, CCI contends it would have "had victory within its grasp." (p. 9). Indeed, CCI asserts that "at a 41% to 31% lead CCI's chances of winning control would have been better than 99%". (pp. 8-9)

However, the liability of the individual Piper defendants was not premised on any violations found in connection with the acquisition of either of these blocks of stock. Although this Court found the June and July letters of defendant W. T. Piper, Jr. violative of Section 14(e), it held that CCI was not injured by them. (480 F. 2d at 377). When this Court reversed the trial court's judgment, it held that the liability of the individual Piper defendants to CCI stemmed solely from the January letters to shareholders. Clearly, these had nothing to do with BPC's unlawful acquisitions in May and July. Therefore, there is no causal connection between the unlawful activities of the individual Piper defendants and the injury CCI is now claiming.

Thus, the policy of vigorous enforcement of the securities laws has been used as the basis for assessing over $2 million in damages and interest against the Defendants whose conduct was not proven to have been the cause of any measurable injury to CCI. In essence, a policy of penalty assessments for deterrent purposes has in this case replaced proof of causation and actual damages.

Certainly no one will dispute that vigorous enforcement of the securities laws is a salutary goal; but fines or penalties may only be assessed pursuant to an express statutory mandate, not by an award of "damages" where neither injury nor damages have in fact been proven to have re-

sulted from a violation*. As the Supreme Court has explicitly stated, damages in securities law actions "should be recoverable only to the extent they can be shown." *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 389 (1970), and may not be based upon "unrealistic and speculative" evidence. *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 155 (1972).

The award of multi-million dollar "damages" in view of the prophylactic injunctive degree granted herein is indeed a penalty assessment, which cannot be justified by any policy of vigorous enforcement, and is expressly precluded by both the statute and the *Mills* decision. If the injunction is to stand, Defendants submit that the damage award should be set aside.

POINT VII

CCI Should Not Have Been Awarded Pre-Judgment Interest.

The District Court awarded pre-judgment interest of $599,010.89 to CCI. The award of pre-judgment interest was not appropriate because it went beyond the mandate of this Court. Moreover, it is improper where it serves only to increase the penalty, not compensate for the loss of the use of money. (2383-88A)

A. Pre-Judgment Interest Is Improper

In *United States* v. *Corbetta*, 101 F. Supp. 529 at 530 (S.D.N.Y. 1951) Judge Ryan noted: "Interest is, of course,

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* In certain circumstances, not present in this case, involving intentional wrongdoing the common law permits an award of punitive damages. However, Section 28(a) of the Securities Exchange Act expressly limits recovery for securities law violations to the "actual damages (sustained) on account of the act complained of," and, as this Court has recognized, punitive damages may not be awarded. *Green* v. *Wolf Corporation*, 406 F.2d 291 (2d Cir. 1968).

compensatory and intended to be neither punitive nor coercive." Pre-judgment interest is appropriate only where the plaintiff has been deprived of the use of an identifiable fund of money by the unlawful action of the defendant. But that situation is not present here as this Court declared that ". . . our holding is premised on the belief that the harm done the defeated contestant is not that it had to pay more for the stock but that it got less stock than it needed for control." 480 F.2d at 362.

Reference to the money CCI allegedly had to borrow or to the interest or attorneys' fees it has had to pay are irrelevant. Additional compensation by way of pre-judgment interest over and above the damages already awarded is clearly improper. This is particularly so since CCI also received in addition to the damages five more years of injunctive relief.

B. The Court Should Have Used the 6% Rate

Even if this Court affirms the holding of the District Court with respect to the propriety of pre-judgment interest, the Court's holding as to the rate of interest should be modified. The Court below allowed CCI interest at the rate of 7½% per annum from September 5, 1969 to August 31, 1972 and at 6% thereafter.*

On September 1, 1972, an amendment to CPLR § 5004 became effective under which 6% per annum was specified to be the legal rate of interest in the State of New York. Prior to that time the fluctuating New York State Banking Board rates had been used in determining the legal rate in some cases, *e.g.*, *Rachlin & Co.* v. *Tra-Mar, Inc.*, 308 N.Y.S. 2d 153 (1st Dept. 1970), and the 6% per annum rate had been used in others, *e.g.*, *Kay Lewis Enterprises* v. *Lewis Marshall*, 296 N.Y.S. 2d 834 (Sup. Ct. N.Y. Cty. 1969).

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* The difference between the amount awarded and a computation at 6% throughout the period is $72,945.60.

The memoranda of the Law Revision Commission reflect that a flat rate of 6% was decided upon as the legal rate for the following reasons:

> "1. This has been the historical rate from 1879 until the present conflict arose.
>
> "2. The interest rate for a loan or forbearance is not logically or necessarily related to the rate for judgments. Different consideration of supply and demand, risk and overhead enter into the rate for a loan or forbearance, which do not apply to judgments.
>
> "3. Entering judgments with interest is an administrative act assigned to the clerk of the appropriate court. A fixed rate permits this function to be accomplished efficiently and routinely *without possible controversy over different rates for different periods.*" (Emphasis supplied) New York State Legislative Annual, p. 88 (1972).

Thus, it is clear that it was precisely to avoid controversy over different rates for different periods that Legislature clarified the point by indicating that 6% per annum was the interest rate to be used.

In *Terkildsen* v. *Waters,* 481 F.2d 201 (2d Cir. 1973), this Court recognized that the issue of the proper rate of interest required clarification, but in that case plaintiff's claim to the Banking Board rate was not properly before the Court.

The proper rate is 6% per annum.

POINT VIII

Defendants Are Not Precluded from Raising Issues Considered in a Prior Appeal When There Has Been an Intervening Change of Law or the Prior Decision Was Erroneous.

In its decision (480 F.2d 341) this Court determined, among other things, that CCI had standing to bring a

private action for damages under Section 14(e) of the 1934 Act, that the Defendants had violated Section 14(e) and BPC had violated Rule 10b-6 of the Securities Exchange Commission under Section 10(b) and that a resulting injury to Chris-Craft could be inferred from the violations. Defendants submit that this Court should reconsider these rulings in the light of intervening decisions and developments. *Gibson* v. *Berryhill,* 411 U.S. 564 (1974); *Davis* v. *United States,* 417 U.S. 333 (1974).

A. Standard of Liability

Less than one month after the prior decision of this Court in the instant case, a majority of this Court sitting *en banc* decided *Lanza* v. *Drexel & Co.,* 479 F.2d 1277 (2d Cir. 1973), which set forth a standard for liability differing entirely from the amorphous concept of "culpability" enunciated in the instant case. This was confirmed by Judge Timbers in his dissent from the *Lanza* decision where he noted that the representative of Drexel on the Bar-Chris Board should have been held liable because of a "reckless disregard for the truth." (479 F.2d at 1320) He stated, relying on his previous opinion in this case, that the Drexel man's knowledge and experience should have led him to make further inquiry.

The error of the prior decision has also been confirmed by CCI itself. This Court ruled in 480 F.2d at 373:

> "We hold that the conduct on the part of First Boston *and its officers* violated § 14(e)." (emphasis added)

In the Petition for Rehearing of First Boston, Miller and Bayard, it was pointed out that Miller and Bayard, the only First Boston officers joined in the suit, had not participated in any way in the preparation of the registration statement for the BPC exchange offer. The Court, when confronted with the fact that it had found two

individuals liable without one shred of evidence in the record to support its conclusion, entered an order dated April 25, 1973 asking the District Court to consider whether Miller or Bayard were individually liable under the standards of liability set forth in the Court's opinion. CCI counsel so clearly recognized that there was no basis in the record for personal liability on the part of Miller and Bayard that he consented to a stipulation that they be dismissed with prejudice as defendants in this action. (2329A)

In the Court's previous opinion in this case three separate explanations of the standard of liability were set forth, prompting Judge Mansfield to observe that the effect of the decision was "to compound existing confusion as to the law in this area." (480 F.2d at 398) Although the majority opinion disclaimed mere negligence as a basis for liability under § 14(e), it nevertheless stated that liability is established when the plaintiff has established that defendant either:

> "(1) knew the material facts that were misstated or omitted, *or*
>
> "(2) failed or refused to ascertain such facts when they were available to him or could have been discovered by him with reasonable effort." 480 F.2d at 364.

The first part of the alternative formulation of the standard of liability for violation of § 14(e) could, as Judge Friendly observed in *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1301, n. 20 (2d Cir. 1973), result in "virtually absolute liability". The second part makes simple negligence a basis for liability.

When this Court reviewed the state of the law *en banc* in *Lanza,* it expressly rejected negligence as a basis for liability under the antifraud provision of the securities laws. The Court noted at p. 1300 of its opinion:

> "We perceive no reason, consonant with the congressional purpose in enacting the Securities and Exchange

> Act of 1934, *thus to expand Rule 10b-5 liability.*" (emphasis added)

The Tenth Circuit recognized in *Clegg* v. *Conk,* CCH Fed. Sec. L. Rep. ¶ 94,897 (10th Cir. 1974), that *Lanza* changed the standard of liability as it has been applied in the Second Circuit and, referring to this Court's opinion in this case, noted:

> "*In Lanza* v. *Drexel & Co.,* 479 F.2d 1277 (2d Cir. 1973), *supra,* the Court *en banc* rejected the idea *advanced in some of its prior opinions* that mere negligence could dispense with the necessity for some species of scienter in 10b-5 cases." (emphasis added)

The Court in *Clegg* expressed concern about the "varying emphases" in the standards of liability relating to purported violations of the antifraud provisions of the securities laws and finally concluded:

> "For this reason we have been persuaded thus to review the decision of this Court insofar as they bear directly upon the necessity of scienter and reliance in Section 10(b) actions. From their common principles and applications may be deduced the propositions that there is required something additional by way of scienter or conscious fault than mere negligence, and something more by way of reliance or causation in fact than some abstract wrong expending its force entirely upon itself."

The *Lanza* decision like the *Clegg* decision surveyed the precedents and set forth the standard. The trial court's findings of fact relating to the Defendants in the instant case demonstrated that their actions were at most negligent, not fraudulent. Applying the *Lanza* standard to this case would require an affirmance of the original dismissal of the action by the Court below.

B. CCI Has No Standing to Sue Under Section 14(e)

In *Birnbaum* v. *Newport Steel Corporation,* 193 F. 2d 461 (2d Cir. 1952), *cert. denied,* 343 U.S. 1956 (1952), it was clearly established that to have standing to sue under Rule 10b-5, a plaintiff must allege that he purchased or sold a security and that such purchase or sale was the result of fraud by the defendant. *Birnbaum* remains the law. *Superintendent of Insurance* v. *Bankers Life & Casualty Co.,* 404 U.S. 6 (1971). CCI was not induced to purchase or sell securities as the result of any act or omission of the defendants and thus has no 10b-5 standing.*

This Court, however, found that CCI has standing under § 14(e). It is respectfully suggested that according standing to a competing tender offeror in a tender battle is far outside of the legislative purpose of § 14(e). The reports of the Congressional Committees make it clear that the class the legislation was designed to protect was the target shareholder not the aggressive offeror.

The Senate Report stated the purpose of the law in succinct terms:

> "This bill is designed to make the relevant facts known so that the shareholders have a fair opportunity to make their decision." S. Rep. No. 550, 90th Cong., 1st Sess. 2-3 (1967)

Moreover, Judge Clark in speaking for the Fifth Circuit recently confirmed the purpose set forth in the legislative history. *Sargent* v. *Genesco, Inc.,* 492 F.2d 750 (5th Cir. 1974). In refusing to accord 14(e) standing to shareholders of a company who had received solicitations urging that the recipients not oppose a refinancing plan, the Court stated at p. 769:

> "The policy behind the statute, as revealed by the legislative history, compels us to read the term 'secu-

* As it has no 10b-5 standing, CCI should not have 10b-6 standing either.

rity holders' as those security holders to whom the offer is addressed. The evil to be remedied by enactment of § 14(e) was inadequate disclosure to tendering security holders. Congress made it clear that the investor protection sought by 14(e) was disclosure *to those who had to make the hold or sell decision."* (emphasis added)

C. The Acts of Defendants Did Not Cause Injury to CCI

This Court previously held that in view of the impracticality of requiring CCI to prove reliance, reliance would be presumed, and stated "we presume that the Piper shareholders would not have accepted the BPC exchange offer but for the misrepresentations to which we have referred above." 480 F.2d at 375. This Court did not, however, conclude that CCI would have gained the slightest advantage from that presumed fact or that BPC, by virtue of its superior cash position, would not have gained control of Piper in any event. Thus, no adequate finding of causation related to an identifiable financial injury has ever been made in this case.

This is not a simple securities case involving a purchaser and seller where proof of reliance is tantamount to proof of causation. See *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128, 153-54 (1972). CCI purchased no securities from BPC, and even if the reliance of the tendering Piper shareholders is "presumed", this does not establish that "but for" the violations found against Defendants CCI would have succeeded in gaining control of Piper or that BPC would not have succeeded.

The previous decision of this Court did not merely presume "reliance" from "materiality"; it presumed causation and injury-in-fact to a third party as well. Neither *Ute Citizens, supra,* nor its underlying rationale goes this far.

Moreover, Defendants have never had an opportunity to rebut either the presumption of reliance or the presumption of causation applied herein, as is required by Federal law. As the Court of Appeals for the Third Circuit recently stated in *Rochez Bros.,* v. *Rhodes,* 491 F.2d 402, 410 (3d Cir. 1974):

> "If defendant is able to demonstrate that there clearly was no reliance, that is, that even if the material facts had been disclosed, plaintiff's decisions as to the transaction would not have been different from what it was, then the nondisclosure cannot be said to have caused the subsequent loss and under the ordinary principle of the law of fraud, recovery should be denied."

See Note, "The Reliance Requirement in Private Actions under SEC Rule 10b-5", 88 Harv. L. Rev. 584.

Defendants respectfully submit that the issues of reliance and causation should be reconsidered in this case.

Conclusion

The decision of this Court dated March 16, 1973 should be vacated, and the decision of the Court below dated December 10, 1971 affirmed. In the alternative, the decision of the Court below awarding CCI damages of $1,673,988 and providing injunctive relief as set forth in the final judgment entered on November 25, 1974 should be affirmed and the award of prejudgment interest of $599,010.89 should be vacated.

Dated: New York, New York
February 3, 1975

Respectfully submitted,

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ADDENDUM

This Addendum illustrates a few of the misrepresentations of fact or distortions of the record below contained in CCI's brief:

CCI's Brief	Facts
1. CCI would have been able to buy the 120,200 Piper shares acquired by BPC in May, 1969 because those shares were "emotionally committed" to CCI. (pp. 7, 8)	The factual support for the statement that a large block of Piper stock was "emotionally committed" to CCI was the statement of Arthur Long, a proxy solicitor, in April, 1969, before BPC entered the contest for control. (1826A) CCI knew in February, 1969, long before its meeting with the SEC when it was told not to purchase Piper shares, that Fund of Funds had a large block of Piper stock, but no effort was made to purchase that block. (1563A)
2. CCI had more than "$10 million in borrowing capacity" and that its existing loan agreements would not prevent it from further borrowing. (pp. 9, 24)	The factual support for the claimed borrowing capacity was the opinion of CCI's banker, Potts. He admitted on cross-examination that CCI could not borrow any additional funds in excess of the $3 million without first obtaining waivers from its senior note holders. (1331-33A; 3107A; 3111-12A)
3. "Even without borrowing, CC could have spent $100 a share in cash to acquire this stock (145,000) . . . ." (p. 9)	CCI had "shot its bolt" and did not have $14.5 million in cash available to it to spend to purchase Piper shares. (480 F.2d at 402)
4. "Since CC's exchange offer attracted more Piper stock than BP's misleading offer, CC clearly would have obtained some, if not most, of the Piper shares tendered to BP . . . ." (p. 8)	CCI offered no evidence that it lost a single Piper share to BPC as a result of BPC's exchange offer. As this Court observed: "Piper shareholders had a third option, i.e., to hold their shares which presumably they would have chosen if all the material facts had been disclosed." (480 F.2d at 375)
5. CCI did not recognize until July 29, 1969 that it could not overcome BPC's unlawful lead. (Footnote, p. 17)	Gordon, CCI's general counsel, testified that CCI knew as early as May 16, 1969 that CCI's chances of getting control of Piper were slim. (1225-27A)

CCI's Brief	Facts
6. ". . . [A]ll the experts on both sides agreed that Chris-Craft had no escape." (p. 30)	Wahrsager, CCI's own expert, testified that CCI could have disposed of its Piper stock by a public offering (2439-40A) and that if the sale had taken place on September 5, 1969, the market value of CCI's stock would have been "around" $50 per share. (2484A)
7. BPC cut off the dividend for the first quarter of fiscal 1970 at Piper over CCI's protest. (p. 10)	The dividend for the first quarter of fiscal 1970 was not declared because the financial statements of Piper for fiscal 1969 could not be closed at the time. (EV 1319-20; EV 1326) When the financials for fiscal 1969 were finally approved in May, 1970, economic conditions had so changed that Piper was anticipating operating losses. CCI with the rest of the Piper Board agreed to defer further consideration of dividends. (Def. Ex. BQ, May 18, 1970 minutes, p. 4) Gordon specifically testified that Piper was justified in not declaring a dividend for fiscal 1970. (1426A)
8. BPC manipulated the size of the Piper Board of Directors. (p. 10)	At all times, CCI had the maximum number of places on the Board to which it was entitled under cumulative voting: three members on an eight-man Board and four members on a ten-man Board. Except for an interim period of approximately three months when Howard Piper served as a ninth director, until the annual meeting of Piper shareholders in February 1971, Piper had an even number on the Board. (EV1353-54)
9. The District Court "flatly rejected as 'wrong', 'erroneous' and 'too speculative' this Court's holding that CC had been damaged by BP's unlawfully acquiring the power to compel a merger at a time of its choosing . . . ." (p. 26)	Judge Pollack correctly pointed out that under Pennsylvania law, 51% of Piper's shares did not by itself give power to merge, but he proceeded on the assumption that BPC "did in fact acquire that merger power on September 5, 1969 . . . ." (2340A)
10. $34 is the "maximum" price that Gant testified CCI would have obtained from a sale on September 5. (p. 28)	Gant testified that if CCI sold its Piper holdings in a public offering on September 5, it would have obtained between $44 and $46 per share. (2822-23A)

CCI's Brief	Facts
11. "Since the minority can not sell its position to a third party or the public, the majority owner is, as Gant admitted, in a position to drive a hard bargain in setting merger terms or buying out the minority." (p. 44)	Gant testified that CCI could have sold its Piper stock to the public in September, 1969. (2439-40A; 2822-23A)
12. CCI's minority block is unmarketable because its purchase would be subject to the "uncertainty" of a statutory appraisal proceeding in which BPC "[b]y deferring a merger until the bottom of a business cycle in the highly cyclical aviation business, . . . could take the minority position . . . at the lowest price." (p. 11)	Defendants' expert, Aubrey Lank, an attorney with extensive experience in statutory appraisal proceedings, unequivocally stated that a dissenter will receive full value for his stock in an appraisal proceeding regardless of the timing of a merger. (2771-75A)
13. BPC refused to register CCI's Piper shares with the Securities and Exchange Commission. (p. 17)	There is absolutely no evidence to support this statement.
14. "Piper lost money in 1972, earned only $2.65 in 1973. . . ." (p. 19)	CCI fails to point out that a non-recurring loss in excess of $22 million caused by a major flood at Piper's main plant in June, 1972 which shut down operations until early 1973 and a three-month strike were the reasons for the loss in 1972 and the reduced earnings in 1973. Absent these unforeseeable events which would not affect the investment value of Piper shares, Fitzgerald's projections were on the mark and were accepted by CCI's expert, Dr. Murray.